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A recent Kansas case involves a new question as to evidence of telephonic communications. In Thompson & Walkup Co. v. Appleby, the Court of Appeals of Kansas, Southern Department, held that while a witness may ordinarily testify to a conversation had by him through a telephone with another person, though he is not able to identify the voice of the person responding, yet, when the latter is to be charged with notice of the conversation (as when it is sought to charge an indorser of a promissory note with liability by a notice of dishonor thus communicated), it must clearly appear that the one who answered was the one who is to be charged; and, therefore, when the only evidence of the giving of the notice aforesaid was the testimony of a witness that he called up the office of the indorser, and did not know whether or not it was the indorser or his bookkeeper, or either of them, that answered, it was held that the sustaining of a demurrer to this testimony, on the ground that it furnished no evidence that notice of dishonor was given, was not error.

Evidence as to a conversation carried on over a telephone may be given by one who took part in it, if the other party is sufficiently identified, *e. g.*, when the witness testifies that he knew and distinguished the voice of the person at the other end of the telephone. Stepp v. State, 31 Tex. Cr. Rep. 349, 1894. So, testimony that the one who spoke to the witness gave his name, and that the witness went immediately to the office of the person named, who admitted the conversation just had by telephone, sufficiently identifies the one who spoke to the witness. William Deering & Co. v. Shumpik (Minn.), 69 N. W. Rep. 1088, 1897.

Further, one who heard the conversation, or only one side of it, can testify to what he heard, if the person at the other end of the instrument is identified; and, consequently, when it is admitted that the conversation was carried on between plaintiff and defendant, one who heard one side of it can testify, though he did not know of his own knowledge with whom the conversation was held. Miles v. Andrews, 153 Ill. 262, 1895.

Owners of bicycles will find satisfaction in the case of Murfin v. Detroit & E. Plank Road Co., in which the Supreme Court of Michigan recently decided that the statute giving turnpike companies a right to collect certain rates of toll from persons traveling on their roads in vehicles drawn by animals, a turnpike company has no right to charge for the use of its road by persons using bicycles. The court said that if they could construe the statute as giving a right to collect tolls from all persons who travel the road there would be little difficulty in holding that bicycles (which in Myers v. Hinds, 68 N. W. Rep. 156, were held to be vehicles) are subject to toll, for they may take judicial notice that a good highway is as essential to their use as to that of any other vehicle. There is nothing in the act, they say, that gives the right to charge toll against pedestrians, and "we have never heard it claimed that such charges were made. Nor have we known of toll being charged for wheelbarrows or carts or hand sleds or baby carriages propelled by human agency, though a good road is as essential to these as to bicycles." The court says further that if this question arose with reference to a four-wheeled vehicle propelled by steam or electricity, there would probably be little doubt of the right to charge and collect toll. It would seem to be covered by the case of Detroit & B. Plank Road Co. v. Detroit Suburban Ry. Co., 103 Mich. 587, 61 N. W. Rep. 880, where it was held that the rights acquired under this act forbid the use of the highway for purposes inconsistent with the rights and franchises of the plank road company.

A distinction they claim may be made between vehicles propelled by man and those depending upon animal power or mechanical motors for propulsion, and that this would not do violence to the act, which has always been construed to permit the use of highways by persons who did not depend upon some means of conveyance besides their own powers of locomotion. "The bicycle," concludes the court "is not subject to the payment of toll by the strict letter of the act. Neither is the motor cycle. Yet we incline to the opinion that payment of toll by the

driver of the latter is within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used. This view seems to receive significant support in the fact that we find few cases where the question has arisen. The bicycle has been used as a road machine for a quarter of a century, and we cannot conceive of the users submitting to a general practice of charging toll without protest that would have led to an adjudication of the question. Furthermore, we have never heard that it was the practice of the companies to charge toll, and we have reason to believe that this company is no exception, but that the cause is here to ascertain whether the company may safely provide exceptional facilities for wheelmen, with the expectation of collecting toll. But two cases where similar questions have arisen are cited by counsel. In Geiger v. Turnpike Road, 167 Pa. St. 583, 31 Atl. Rep. 918, a bicycle was held subject to toll, as a two-wheeled carriage, under a statute which gave the right to collect toll from "all and every person and persons using the said road * * * and to stop any person driving any * * * sulky, chair, chaise, phæton, cart, wagon, sleigh, sled, or other carriage of burthen or pleasure, * * * and for every other carriage of pleasure under whatever name it may go, the like sums according to the number of wheels and horses drawing the same." See also Williams v. Ellis, 5 Q. B. Div. 176.

## NOTES OF RECENT DECISIONS.

ADJOINING LAND OWNERS—LIGHT AND AIR—FENCE ON DIVISION LINE.—According to the case of Triplett v. Jackson, 48 Pac. Rep. 931, recently decided by the Court of Appeals of Kansas, a person may erect a high board fence upon his own land or on the division line, though by so doing he interferes with the light and air of a building on an adjoining lot, especially when the fence would not have interfered with the light and air if the building had been placed near the center of the lot; for the law aims to protect each person in the enjoyment of his own property. In England, by what is known as the doctrine of ancient lights, twenty years' uninterrupted enjoyment gives the owner of a building a prescriptive right to the light and air coming to his windows over the land of another. Act 2 & 3 Wm. 4, ch. 71; Darwin v. Upton, 2 Saund. 175, ch. 1786; Younge v. Shaper, 27 L. T. (N. S.) 643; Flight v. Thomas, 8 Cl. & F. 231; Tapling v. Jones, 11 H. L. Cas. 290; Simper v. Foley, 2 J. & H. 555; Ladyman v. Grave, 6 L. R. Ch. 763; Kelk v. Pearson, 6 L. R. Ch. 809; City of London Brewery Co. v. Tennant, 9 L. R. Ch. 212; Mitchell v. Cantrill, 37 Ch. D. 56; Robson v. Edwards (1893), 2 Ch. 146; Martin v. Price, 1 Ch. 276; Jenks v. Viscount Clifden, 1 Ch. 694. But this rule has met with little favor in the United States, being rejected by most courts. Ray v. Lines, 10 Ala. 63; Ward v. Neal, 37 Ala. 500; Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111; Ingraham v. Hutchinson, 2 Conn. 584; Goodwin v. Hamersley (Conn.), 36 Atl. Rep. 1065; Hulley v. Security Trust Co., 5 Del. Ch. 578; Turner v. Thompson, 58 Ga. 268; Keiper v. Klein, 51 Ind. 316; Stein v. Hauck, 56 Ind. 65; Morrison v. Marquardt, 24 Iowa, 35; Ray v. Sweeney, 14 Bush (Ky.), 1; Oldstein v. Fireman's Bldg. Assn., 44 La. Ann. 492; Pierre v. Fernald, 26 Me. 436; Cherry v. Stein, 11 Md. 1; Rogers v. Sawin, 10 Gray (Mass.), 376; Richardson v. Pond, 15 Gray (Mass.), 387; Keats v. Hugo, 115 Mass. 204; King v. Miller, 8 N. J. Eq. 559; Hayden v. Dutcher, 31 N. J. Eq. 217; Parker v. Foote, 19 Wend. (N. Y.) 309; Doyle v. Lord, 64 N. Y. 432, 439; Knabe v. Levelle, 23 N. Y. Suppl. 818; Lindsey v. First Natl. Bk., 115 N. C. 553; Mullen v. Stricker, 19 Ohio St. 135; Hoy v. Sterrett, 2 Watts (Pa.), 327, 331; McDonald v. Bromley, 6 Phila. (Pa.) 302; Hazlett v. Powell, 30 Pa. 293; Rennyson's Appeal, 94 Pa. 147; Napier v. Bulwinkle, 5 Rich. L. (S. Car.) 311; Klein v. Gehrung, 25 Tex. (Sup.) 232; Hubbard v. Town, 33 Vt. 295; Powell v. Sims, 5 W. Va. 1; though it was adopted in a few early cases: U. S. v. Appleton, 1 Summ. (U. S.) 492; Clawson v. Primrose, 4 Del. Ch. 643; Gerber v. Grabel, 16 Ill. 217; Manier v. Myers, 4 B. Mon. (Ky.) 514; Taylor v. Boulware, 35 La. Ann. 469; Story v. Odin, 12 Mass. 157; Robeson v. Pittenger, 2 N. J. Eq. 57; Lampman v. Milks, 21 N. Y. 505,

511; McCready v. Thomson, Dudley (S. Car.), 131; Berkeley v. Smith, 27 Gratt. (Va.) 892.

Accordingly, it is the general rule that, no matter what his motive, whether for his own benefit, or out of pure malice to his neighbor, one may erect any structure he pleases on his own land, though it obstructs the light coming to his neighbor's windows, and renders the latter's house uninhabitable. Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111; Lapere v. Luckey, 23 Kan. 534; Triplett v. Jackson (Kan.), 48 Pac. Rep. 931; Letts v. Kessler, 54 Ohio St. 73, reversing 7 Ohio Cir. Ct. 108. But the courts of Michigan hold, with better justice, that such an erection, if malicious, will be enjoined, not on the ground of interference with any right of light and air, but on the ground that it is a nuisance. Burke v. Smith, 69 Mich. 380; Flaherty v. Moran, 81 Mich. 52; Kirkwood v. Finegan, 95 Mich. 543.

Such an erection will be enjoined, however, if it is on the division line; for it then interferes with the plaintiff's rights. Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111; Peck v. Roe (Mich.), 67 N. W. Rep. 1080; *Contra:* Triplett v. Jackson (Kan.), 48 Pac. Rep. 931, and *a fortiori*, it will be enjoined, if it is on the land of the plaintiff. Sankey v. St. Mary's Female Academy, 8 Mont. 265.

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HUSBAND AND WIFE—NECESSARIES—HUSBAND'S LIABILITY.—In Dolan v. Brooks, 47 N. E. Rep. 408, decided by the Supreme Judicial Court of Massachusetts, it was held that a wife is ordinarily authorized to purchase clothing on the husband's credit only in case of necessity, and where the wife has habitually clothed herself out of her separate income, which is adequate for that purpose, the husband is not liable for clothing ordered by her, as such practice is presumably by understanding between them, and constitutes a provision for her clothing. It was further held that it was immaterial that the fact that the wife had such separate income was not known to the person from whom the clothing was purchased, and that to make clothing ordered by a wife a necessary it must be not only suitable to her station in life, but needed by her. It was not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relied on the obligation which a husband is under to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question was whether, under the circumstances of this case, the defendant is liable on that ground. And the court said that a wife has not authority generally to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent, with authority to pledge his credit. This is the law in England as well as here. Rayner v. Bennett, 114 Mass. 424; Conant v. Burnham, 133 Mass. 513; Debenham v. Mellon, 6 App. Cas. 24; Jolly v. Rees, 15 C. B. (N. S.), 628.

It is possible that a husband may do things himself, or consent to the doing of things by his wife, or so conduct himself in other respects as to constitute her his agent in relation to such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those matters relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. Debenham v. Mellon, *supra*. This case, however, as already observed, stands on a different ground from either of those just referred to.

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RAILROAD COMPANY — COLLISION WITH ELECTRIC CAR—DEGREE OF CARE—SIGNALS.—The Supreme Court of New Jersey has decided, in the case of N. Y. & G. L. Ry. Co. v. N. J. Electric Ry. Co., 37 Atl. Rep. 627, that when a railroad company fails to give the proper signals of the approach of a train, and a collision ensues with an electric street railway car, the former company cannot recover from the street railway company for losses due to the collision, if its failure to give the signals contributed thereto; that the fact that the two companies have a mutual agreement providing for a derailing switch on the tracks of the electric railway, as a precaution against collision at that crossing, and also providing, that before an electric car shall be permitted to pass over the crossing the conductor of that car who shall be operating the derailing switch shall look in

both directions, and listen for the approach of railroad trains, does not excuse the railroad company from giving, the statutory signals as a warning of approaching trains; and that when the neglect to give such signals appears to have contributed to the collision, the railroad company cannot recover against the electric street railway company, although the conductor of the electric car who operated the derailing switch was negigent in failing to look in both directions, and to listen for approaching trains.

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CONTRACT—VALIDITY — CONSIDERATION.—In Mott v. Fowler, 37 Atl. Rep. 717, decided by the Court of Appeals of Maryland it was held that an agreement, on sufficient consideration, to act as administrator, without compensation, is valid, and that where one agrees with the widow and children of a decedent to act as administrator without compensation, and they become sureties on the bond, as well as waive the right of administering given them by statute, the agreement is supported by sufficient consideration. The court said:

It would be a reproach to the law if such a claim as the appellant is making in this case could be recovered. It appears that the late Caleb S. Maltby, who was a man of large means, residing in the State of Connecticut, died there intestate. The principal administration upon his estate was had in that State. But he also owned some valuable leasehold property in the city of Baltimore, which his widow and two daughters sold; they also being residents of Connecticut. They were advised that they could not make a satisfactory title to this Maryland leasehold estate without administering here. Not desiring to be troubled with the details of this administration, and only for the purpose of making a good title to property they had already sold, they requested the late George P. Mott, who was then in their employ, and had been for a long time employed by the late Mr. Maltby, to act as administrator without compensation. He replied that he would be happy to act in the capacity mentioned if it would spare "the ladies trouble and expense." And in the same letter in which he made this statement he estimated that the total expenses of administration, not including attorney's fees, would not exceed $300; giving the two items, viz., State tax on commissions and court expenses, and excluding all commissions for himself, except, of course, sufficient to pay the State tax on administrator's commissions. But in addition to this he stated again and again that he was acting without compensation, and, when congratulated on the fact that he would get commissions on a large estate, he replied that "it did not amount to anything for him—only the honor." But it is conceded that Mr. Mott agreed to act as administrator without compensation. He died, however, before completing the administration, leaving a will in which the appellant, his widow, was named as executrix. She filed a petition in the Orphans' Court of Baltimore City, claiming commissions for her husband as administrator of C. S. Maltby; and the court below refused to allow any and passed an order dismissing her petition. From this order she has appealed. As we have already said, the claim here set up is without merit. In the case of Bassett v. Miller, 8 Md. 548, in which a widow gave up her right to minister upon the estate of her husband in consideration of receiving from the party in whose favor she relinquished all the commissions except $100, this court (Mason, J., delivering the opinion) said: "While such contracts should not be encouraged, it is far better, in view of public policy and sound morality, that they should be sustained than that conduct should be tolerated by this court by which solemn engagements may be repudiated, and fraud and deception perpetrated with impunity." But the "engagement," contract, or whatever it may be called, which was made between the late Mr. Mott and the widow and children of the late C. S. Maltby, by which the former was to act as administrator without commissions, can be sustained upon well settled principles of law. It is said to be without consideration; but not so. The widow and children, in consideration of the agreement of Mr. Mott, not only waived a valuable right (that of administering) which the law (article 93, sec. 18, Code, Md.) vested in them, but they assumed the obligation of sureties on his bond for the faithful performance of his duties as administrator. These constitute a sufficient consideration. Drury v. Briscoe, 42 Md. 154; Steele v. Steele, 75 Md. 477, 23 Atl. Rep. 959; Ohlendorf v. Kanne, 66 Md. 499, 8 Atl. Rep. 351. As was said in McCaw v. Blewit, 2 McCord Eq. 90: "He voluntarily undertook the duty under the express stipulation that he would not charge commissions, and he cannot now be permitted to violate that contract. That which was expressly declared to have been intended as a gratuity shall not now be converted into a demand." We do not consider it necessary to fortify our conclusion by the citation of other authorities, or by a discussion of the right of the orphans' court, in its discretion, to refuse commissions in a case like this. The testator of the appellant made a valid and binding agreement, which was binding upon him during his life, and now that he is dead it is equally binding upon his executrix.

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Post. 241. N. 12.

ACTION FOR INDUCING BREACH OF CONTRACT—COMPELLING DISCHARGE OF SERVANT—LABOR UNION.—The right to recover damages against one for inducing another to break a contract, was affirmed by the Supreme Judicial Court of Maine in Perkins v. Pendleton, 38 Atl. Rep. 96. The court exhaustively reviewed the authorities upon the question as follows:

The plaintiff alleges that upon a certain day he was, and for 22 years prior to that time had been, in the employ of the Mt. Waldo Granite Company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ "but for the wrongful acts, inducements, threats, persuasions, and grievances committed by said defendants against the said plaintiff as hereinafter set forth;" that on the day named, and "at divers other times thereafter until the

date of the plaintiff's writ," the defendants "did unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiff from carrying on his said trade, occupation, or business as a stone cutter for the said Mt. Waldo Granite Company, and wrongfully, unlawfully, and unjustly had him discharged without any justifiable cause from the employment of the said Mt. Waldo Granite Company by willfully threatening, persuading, inducing, and by other overt acts compelling, the said Mt. Waldo Granite Company, against its will, and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mt. Waldo Branch of the Granite Cutters' National Union;" whereby he suffered the injury specially set out in his declaration. Does this statement of facts sufficiently set out an actionable wrong upon the part of the defendants.

That an action lies under certain circumstances for procuring a third person to break his contract with the plaintiff has been frequently decided by the courts of England and of this country.

In Lumley v. Gye, 2 El. & Bl. 216, decided in 1853, the action was for knowingly and maliciously inducing an opera singer to break her contract with the plaintiff to perform exclusively for a certain time in his theater. The right of action was sustained by a majority of the court.

In Bowen v. Hall, 6 Q. B. Div. 333, decided in 1881, a person had contracted to manufacture glazed bricks for the plaintiff, and not to engage himself to any one else for a term of five years, The English court of appeals held that an action could be maintained against the defendant for maliciously procuring a breach of this contract, provided damage accrued; and that to sustain the action it was not necessary that the employer and employee should stand in the strict relation of master and servant. It was said by the court in this case: "That wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. • • • If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. • • • Merely to persuade a person to break his contract may not be wrongful in law or fact; • • • but, if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act if injury ensued from it."

The doctrine of these cases has been very generally adopted, and the cases themselves very frequently cited, by the courts of this country. Walker v. Cronin, 107 Mass. 555; Bixby v. Dunlap, 56 N. H. 456; Noice v. Brown, 39 N. J. Law, 569; Haskins v. Royster, 70 N. C. 601; Daniel v. Swearengen, 6 S. Car. 297.

In view of these authorities and others, which it is not necessary to refer to, it must be conceded that for a person to wrongfully—that is, by the employment of unlawful or improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee; in fact it is not confined to contracts of employment.

But in this case the plaintiff does not allege that the Mt. Waldo Granite Company was induced by the wrongful means adopted by the defendants to break a contract, nor that there was any contract between the plaintiff and the employer for any definite time. We must, therefore, assume that there was none, that either party had the right to terminate the employment at any time, and that the act of the Mt. Waldo Company in discharging the plaintiff was lawful, and one which the company had a perfect right to do at any time. The question presented then, is, whether a person can be liable in damages for inducing and persuading, by threats or other unlawful means, an employer to discharge his employee when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employee. The question is a novel one in this State, but it has already arisen and been passed upon by the courts of some other States.

In Walker v. Cronin, 107 Mass. 555, the plaintiffs alleged that the defendant did "unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and willfully persuaded and induced a large number of persons who were in the employment of the plaintiff," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiff, without their consent and against their will," and alleged that the plaintiffs lost the services of said person and the profits and advantages they would otherwise have made, and suffered losses in their business. It will be noticed that there is no allegation here of any definite contract as to time between the plaintiffs and their employees who were induced to leave their employment, and one ground of action was that certain persons who were about to enter into their employment, but who had not commenced at the time, were induced to leave and abandon the employment of the plaintiffs. But the court held in an exhaustive opinion which has been frequently cited by other courts in this country, and which was cited by counsel in the argument in Bowen v. Hall, *supra*, that the action could be maintained. It is said in the opinion: "This [declaration] sets forth sufficiently (1) intentional and willful acts (2) calculated to cause damage to the plaintiffs in their lawful business (3) done with the unlawful purpose to cause such damages and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting." The court quotes the general principles as announced in Comyns' Digest. "Action upon the Case:" "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages;" and goes on to say that "the intentional causing of such loss to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong." Later in the opinion the court uses this language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition or the exercise of like right by others, it is *damnum absque injuria*, unless some

superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

This case was not decided upon the ground that the plaintiffs could recover for the loss of the value of actual contracts by reason of their non-fulfillment, because, so far as the case shows, there was no breach of contract, but the gravamen of the action was, as expressed by the court, "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy."

In Chipley v. Atkinson, 23 Fla. 206, 1 South. Rep. 935, the court decided that, although no contract existed between the master and servant, and no legal right, as between them, was violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. The court, in its opinion, after quoting freely from Walker v. Cronin, *supra*, and after referring to numerous other authorities, says: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement is of itself a bar to an action against a third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but, so long as the former is willing and ready to perform, it is not the legal right, but is a wrong, on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

In Lucke v. Assembly, 77 Md. 396, 26 Atl. Rep. 505, decided in 1893, the action was to recover damages for the wrongful and malicious interference of the defendant, by means of which the plaintiff was discharged from his employment, and thereby deprived of his means of livelihood. The defendant, a labor organization, gave notice to the plaintiff's employers that in case the plaintiff, a non-union man, was longer retained, it would be compelled to notify all labor organizations of the city that their house was a non-union house. The work of the plaintiff was entirely satisfactory to his employers, who intended to retain him permanently, but who, in their contract, reserved the right to discharge him at the end of any week. The court decided that the action could be maintained and damages recovered from the defendant for maliciously and wantonly procuring his discharge. In that case the declaration alleged the procurement of a breach of contract by the wrongful acts of the defendant. The court held that the evidence did not sustain the declaration, but allowed an amendment, saying: "If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly." We also quote from the same opinion, the following: "The appellant, by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy." In this latter case Chipley v. Atkinson, *supra*, is quoted, and expressly approved.

In Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. Rep. 58, decided in 1896, it was held that one who procures the discharge of an employee, not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employee for damages, whatever may have been his motive in procuring the discharge. But the doctrine of the latter cases cited in this opinion was expressly recognized and approved by the court in this language: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat *aliunde* the exercise of a lawful right, had broken up the contract relation between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

In Harvester Co. v. Meinhardt, 24 Hun, 489, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day, or by the piece, but I do not think such distinction rests upon any sound reason. . . . In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment; and the probability or certainty of such loss would be, in each case, a question of fact."

The same principle has been applied to the procurement, by wrongful means, of the breach of contracts of sale. For instance, in the case of Benton v. Pratt, 2 Wend. 385, the plaintiff had made an oral contract for the sale of chattels. The contract was not enforceable, because within the statute of frauds. The defendant fraudulently represented that the plaintiff did not intend to carry out the contract, and deliver the chattels, and thereby procured a breach of the contract by the other party to it. It was said by the court: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding on them or not. The evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendant."

And in Rice v. Manley 7. 82, one S had contracted by parol to sell and deliver to the plaintiff a quantity of cheese, but, being made to believe, by the fraud of the defendant, that the plaintiff did not want the cheese, sold it to the defendant. The contract was not binding because within the statute of frauds, but it would have been performed by S had it not been for the fraud of the defendant. The court held that an action was maintainable against the defendant therefor.

Our conclusion is that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interfer-

ence, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employee whom he would otherwise have retained.

The case of Heywood v. Tillson, 75 Me. 225, in no way conflicts with this result. There the court simply decided that the defendant was not liable for doing what he had a perfect and absolute right to do, even if in doing this he was actuated by a malicious motive against the plaintiff. Many cases were cited to the effect that "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful."

We think that the important question in an action of this kind is as to the nature of the defendant's act, and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment, or to discharge an employee, by persuasion or argument however whimsical, unreasonable, or absurd, is not, in and of itself, unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee whom he desired to retain, and would have retained, except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make a defendant liable in an action of this kind.

## ILLEGAL TRADE RIVALRY.

As was noticed at some length in a previous article,[1] a person is allowed great liberty in conducting his business and governing his trade relations. There are of course lines of business which the law does not allow because against public policy, and a person may not conduct his business in a way or in a place which would render it a nuisance to society. With such restrictions we have nothing to do in the present article. We shall not treat of the relation of a man's business to society but to individuals who may be injured by the manner in which the business is conducted. In the previous article referred to we noticed that injurious acts of trade competition might be done from mere whim or caprice, or even with a bad motive, and the law refuse to consider the motive lest in the complications and uncertainties which would arise from such consideration, the freedom of competition should be impaired. We shall in this article endeavor to circumscribe these privileges of legitimate trade competition and disclose the boundary where the law says thus far and no farther. Although many acts of trade rivalry done to the injury of another do not create legal liability the law looks upon them with disfavor, and if they are to go unpunished they must come strictly within the limits of legitimate competition. As a broad and general proposition, while a person for whatever motive may enter into, or continue, or refuse to enter into or continue business relations with another without liability because of any malicious intent, it is not his privilege to maliciously influence another in the conduct of his business so as to willfully injure a third person.[2] In Delz v. Winfree the syllabus of the report states the question at issue as follows: "No action for conspiracy will lie by a butcher against several dealers in beef cattle because they have combined to refuse to sell him beeves, but where the petition further alleges that defendants also induced a dealer in slaughtered meat to likewise refuse to sell him, such interference with his business is a cause of action." And the following from the opinion of the court will give the substance of the court's decision: "The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to his property.' The privilege here asserted must be limited, however, to the individual actions of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing." This quotation, which is unquestionably good law, has expressed the distinction which we are seeking as clearly as we could by extended comment. A comparison between

[1] 43 Cent. L. J. 302.

[2] Delz v. Winfree, 16 S. W. Rep. 111; Olive v. Van Patten, 25 S. W. Rep. 428; Moores & Co. v. The Bricklayers' Union, No. 1, VII R. & C. L. J. 108; Van Horn, 52 N. J. Law, 284; Jackson v. Stanfield, 36 N. E. Rep. 345; Temperton v. Russell, 4 Reports (Q. B. A.) 376; Curran v. Galen, 22 N. Y. S. 826; Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811; State v. Glidden, 55 Conn. 46; State v. Dyer, 67 Vt. 690; Murdock v. Walker, 152 Pa. St. 595; Vegelahn v. Guntner, 44 N. E. Rep. 1077.

Lumley v. Gye[3] and Boulier Bros. v. Macauley,[4] will aid us in distinguishing between legitimate and illegal competition. In both of these cases, one who had contracted to perform at a theater was induced to break her contract. In both cases the result was injury to the one with whom the singer had first contracted. In the English case the party who caused the breach of contract and consequent injury to the other party was held liable. In the Kentucky case he was not held liable. The reason for the distinction is not difficult of comprehension. There is nothing to show in the former case that the party inducing the singer to break her contract wished to secure her performance at his theater, or had any motive in the line of trade competition. In the latter case there was no intention shown to injure the owner of the theater who had first hired Mary Anderson, and the injury to him may be considered only an incident. The manager of a rival theater wanted Mary Anderson to play at his theater and hired her to play on the same night upon which she had previously agreed to perform at the theater with whose owner she first contracted; and in consequence of this, her contract with the first theater owner was broken. Granting, however, that in the Kentucky case an intention to do injury to the one who first hired Mary Anderson had been the controlling motive of the one who afterwards employed her under circumstances which caused her to break her first contract, then in both cases the injury would have been intentional. The distinction would undoubtedly have been the same; for in the Kentucky case the defendant was exercising his right to employ whomsoever he pleased, and the court could not, if our contention in our former article is correct, go beyond that right to inquire into his motive or consider the broken contract. In the English case the defendant was not so shielded. The court in deciding the Kentucky case, however, did not draw this distinction which we have just made. Although they reached, as it seems to us, a correct decision, in explaining their decision they became entangled in an erroneous consideration of the motive. An employee may quit work, or threaten to quit, regardless of his motive, even though his acts are prompted alone by a desire to injure his employer or some third person, but if some third person induces the employee to quit work, with the intention of injuring the employer, and not to secure the services of the one whom he induces to quit, the employer may hold such third person in damages for the injury.[5] Again an employer may discharge his employee, and, therefore, may threaten to discharge him, if he does not conform to certain requirements, even if in so doing his object is solely to injure his employee or a third person; but what an employer may do of his own accord without liability, another person may not induce him to do.[6] This is very clearly stated in Chipley v. Atkinson. The syllabus of the report states the case as follows: "An action lies in behalf of an employee against a person who has maliciously procured an employer to discharge such employee from employment in which he is engaged under a legal contract for a certain period, provided damage result to the employee from such discharge." After reciting authorities at length the court says, "From the authorities referred to in the preceding paragraph and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or to refuse to perform it, and in so doing he violates no right of the other party to it, but so long as the former is willing and ready to perform, it is not the legal right but is a wrong on the part of the third party to maliciously and wantonly procure the former to terminate or refuse to perform it." As we have intimated when one causes another to change his trade relations with a third person to the injury of the third person the motive with which it is done

[3] 2 El. & Bl. 216.
[4] 91 Ky. 140.

[5] Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 L. R. (Q. B. D.) 333; Haskins v. Royster, 70 N. C. 601; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811; Sherry v. Perkins, 147 Mass. 212; Thomas v. C., N. O. & T. P. Ry. Co., 62 Fed. Rep. 803.

[6] Chipley v. Atkinson, 1 South. Rep. 934; Curran v. Galen, 22 N. Y. S. 826; State v. Glidden, 55 Conn. 46.

is a proper subject of consideration. It does not necessarily follow, however, because we cause some one to change his trade or business relations with a third person with the knowledge on our part that such acts will certainly cause injury to the third person, that our motive is wrong in law. Such injurious acts though *prima facie* wrong may be susceptible of explanation.[7] One might induce an employee to leave his employer because such employment is unhealthy or immoral, or induce a customer to quit trading with a certain grocer because he sells unwholesome food or for many other reasons, which we presume the law would consider proper and justifiable motives. If we say that influencing another in the conduct of his business to the injury of a third person is illegal if done maliciously, we are dependent upon the definition of malice. The proposition is not as simple as it seems. Malice is perhaps best defined as the intent to injure another without right or justifiable cause.[8] In other words certain acts are malicious because they are unlawful and unlawful because they are malicious. Our definition leaves us reasoning in a circle. We are left without any serviceable general rule, and must depend largely upon the policy of the law in different classes of cases to determine whether or not acts are right and justifiable. "Competition," it is said in a well known leading case,[9] "exists when two or more persons seek to possess or to enjoy the same thing." "It follows," says the same authority, "that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition." In every day business that which different ones, for the most part, compete for and strive to possess is the trade or patronage of others; *i. e.*, the privilege of doing just what the name indicates, "trading" or exchanging. What means can we lawfully employ to induce people to exchange commodities or deal with us rather than with some one else? What more reasonable and natural way is there than to give those with whom we deal more than any one else would give them in exchange for what they have to offer us? A tradesman may persuade customers to deal with him by reducing the price at which he sells his commodities, or one who wishes to contract his labor or services by reducing the price at which he will work. We know of no limit placed upon competition which consists of securing customers by selling commodities cheap or even by giving them away or by performing services for a less price than others charge.[10] Apparent injustice is often done to individuals and injury to society along this line, however, without legal liability. Large trusts and combinations often crowd out smaller concerns in this manner. The trust finds some outside firm selling commodities in a certain place. Immediately the trust cuts prices so that that line of business can be carried on in that place only at a loss. The outside firm has not sufficient capital to carry on the fight, and must give up business. When it is out of the way the trust can charge whatever price it pleases. Such a proceeding has two features that are objectionable in law. It contemplates driving ing other tradesmen whose rights should be respected out of the business, and it has in view a fixing of prices by stifling competition. Yet we know no authority that holds that a reduction in price of commodities or charge for services for the direct purpose of securing and retaining the trade or patronage of those who may wish to purchase those commodities or employ such labor is illegal, although such reduction may be a part of the plan to drive others out of that business, and in that manner secure a monopoly of the business and raise the prices. This phase of the question was quite thoroughly discussed in The Mogul Steamship Co. v. McGregor, Gow & Co.,[11] the opinions filed in the report of which case contains a most valuable discussion of the limits and privileges of competition. In this case a certain number of steamship companies combined to control freight rates from certain Chinese ports to England, and to compel all rival ships to abandon carrying freight between these

[7] Payne v. W. A. R. R. Co., 81 Tenn. 507.

[8] State v. Coella (Wash.), 28 Pac. Rep. 28; Lovett v. State, 11 South. Rep. 550; Territory v. Egan, 3 Dak. 119; Buckley v. Knapp, 48 Mo. 152; Michell v. Wall, 111 Mass. 498; Tuttle v. Bishop, 30 Conn. 80.

[9] Mogul Steamship Co. v. McGregor, Gow & Co., 23 L. R. (Q. B. D.) 598.

[10] Mogul Steamship Co. v. McGregor, Gow & Co., 23 L. R. (Q. B. D.) 598.

[11] 23 L. R. (Q. B. D.) 598.

points. Lord Esher in a dissenting opinion says: "It follows that the act of the defendants in lowering their freights far beyond a lowering for any purpose of trade—that is to say, so low that if they continued it they themselves could not carry on trade—was not an act done in the exercise of their own free right to trade, but was an act done evidently for the purpose of interfering with, *i. e.*, with intent to interfere with, the plaintiff's right to a free course of trade, and was, therefore, a wrongful act as against the plaintiffs' right; and as injury ensued to the plaintiffs, they had also in respect of such act a right of action against the defendants." The majority of the court, however, decided against this contention, and in so doing followed the greater weight of authority found in the decisions. The opinion of the majority of the court treated the subject mentioned above as follows: "To say that a man is to trade freely but that he is to stop short of any act which is calculated to harm other trades men and which is designed to attract business to his own shop would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade and so to be a lawful excuse for what will harm another if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." "And what is to be the definition of a 'fair freight'? It is said that it ought to be a normal rate of freight such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future." We may gather from the majority decision in this case that where trade is the subject of competition we may secure such trade in any way which increases that which we give or decreases that which we demand in exchange whether it be labor, money or merchandise. But the trade for its own sake must be the object sought. We do not believe we are permitted to go to the same length in securing the trade of another solely to drive him out of the business with no purpose after we have secured it, of retaining the trade, and with no desire for it except as a means of injuring our rival. The law does not recognize the right of any one to deliberately make the destruction of another his means of advantage. If injury to another follows as an incident to my lawful attempt to secure trade advantage the law will not hold me liable, even if such injury must have been anticipated; but if in my plan trade advantage becomes the incident which is to be secured somehow through the destruction of another as a necessary means, the law will hold me liable. The following illustration will indicate one way in which this question is frequently presented: Tradesmen in some particular line of business combine to control prices. Some one in that line of business refuses to join the organization or be bound by its prices, and sells or works for a less price greatly to the injury, perhaps, of all in that line of business, because it lowers the price for all. Suppose now, in order to break up the business of this obstinate or independent one, or in order to coerce him to raise his prices, the combination at a loss to itself and admittedly with no intention of securing the trade of the one whom it is seeking to injure, but solely to injure or coerce him, opens up an office or store next door and cuts prices away below cost, and thus drives the one whom they seek to injure out of business. We believe such actions would be illegal and that damages could be recovered. We know of no authorities directly upon this point, but if such a case were presented to the court and it were clearly shown that this cut rate was intended to injure and destroy the business of another and not to secure another's trade, we believe the court would not be bound by the privileges of trade competition, for it would not be a competition for trade. The law will not follow a transaction through two or more stages in order to find the intended benefit when a third person is injured, and will not allow an indirect or remote trade advantage to excuse such injury. We are perhaps most likely to be confused and misled in this particular, namely, to think because the law permits us for the most part, as we have noticed, to conduct our own trade relations, in whatever

way we think will most benefit our trade or business that the law is especially interested in our particular trade, and will allow us to secure trade advantage, or do that which we expect will secure trade advantage, by indirect means and in a roundabout way regardless of the rights of others. The law has no such inclination. This point is quite clearly brought out in the case of Delz v. Winfree quoted above. The several dealers in beef cattle could combine and agree that they would not sell to a certain butcher, although their motive in so doing was for coercion and with intention to cause injury to the butcher, but the law did not permit them by inducing another dealer also to refuse to sell to the butcher, to accomplish by indirection the same result which they would have been permitted to accomplish through their own acts directly. The case of Curran v. Galen,[12] cited above, affords another illustration. In this case defendants had procured the discharge of the plaintiff from service because he did not belong to the association of which they were members, and the plaintiff brought suit for damages sustained through loss of service. The court said: "The defendants had a perfect right, as we have seen, to unite with this or any other labor organization, but they had no right to insist that others should do so, and when they make plaintiff's refusal to join it a pretext for depriving him of his right to labor they interfere with his personal liberty in a manner and to an extent the law will not countenance, and their action, instead of offering a protection to, operates as a restraint upon 'honest labor.'" It seems quite clear from the authorities,[13] that if one maliciously induces another to terminate or modify his business relations with a third person to the injury of such third person, it is not necessary that the one thus influencing the other should use either force, fraud, threats or intimidations in order to render him liable for damages done to the third party. The expressions used by the authorities are "persuading," "procuring," "enticing," "influencing" and like terms. In Bowen v. Hall, the court says: "Merely to persuade the person to break his contract may not be wrongful in law or in fact, but if the persuasion be used for the direct purpose of injuring the plaintiff, it is actionable if injury ensues from it." The malicious motive and resultant injury constitute the cause of action. The particular means by which the result is accomplished is of secondary importance.

WILLIAM H. TUTTLE.

Chicago, Ill.

[12] 22 N. Y. S. 826. *Ante p. 254.*

[13] Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 L. R. (Q. B. D.) 333; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Chipley v. Atkinson, 1 South. Rep. 934; Delz v. Winfree, 16 S. W. Rep. 111.

## ATTACHMENT—INTERVENTION—BURDEN OF PROOF.

### DANIEL v. SOLOMON.

*Court of Appeals of the District of Columbia.*

The right of junior attachment or execution creditors, to intervene in an attachment suit, and deny the grounds of attachment set out in the plaintiff's affidavit, exists independently of statutory provisions.

An execution issued by a justice of the peace and placed in the hands of a constable, creates such an interest in goods of the execution debtor, seized under a prior attachment, as will entitle the execution creditor to intervene in the attachment suit, though there has been, and can be, no actual levy of the execution on such goods.

The petition of an intervening creditor in an attachment should aver that the debtor has no other property than that attached, to which the intervener can resort for satisfaction of his claim; but the absence of such an averment, not having been taken advantage of in the court below, cannot be availed of on appeal.

Upon the intervention of junior attachment or execution creditors in an attachment suit, denying the grounds of attachment set out in the affidavit, the burden is on the plaintiff to prove the existence of those grounds as stated; but if fraud and collusion between the original parties be alleged, the burden will be upon the interveners to prove that fact.

MR. JUSTICE SHEPARD delivered the opinion of the court:

The appellants, Daniel and Blumenthal, have appealed from a judgment of the Supreme Court of the District of Columbia, dismissing a petition of intervention filed by them in an action of debt depending in said court between Elias Solomon as plaintiff, and Stern and Livingston as defendants. Solomon commenced said suit December 26, 1896, upon two notes amounting together to the sum of $1,400. At the same time he sued out a writ of attachment against them on the ground that they had assigned, disposed of and secreted, and were about to assign, dispose of and secrete, their property, with intent to hinder, delay and defraud their creditors. The writ of attachment was executed by the marshal by seizing the goods of the defendants.

On January 21, 1897, appellants filed their plea of intervention in which they alleged: (1) That

they had obtained a judgment against defendants for the sum of $162.50, besides costs, in the court of a justice of the peace of said district, and that a *fi. fa.* therein had been issued and delivered to a constable for execution. (2) That no real ground existed for plaintiff's attachment. (3) That the affidavit does not state facts justifying the attachment. (4) That defendants have done all in their power to expedite a judgment in favor of the plaintiff, and have colluded, and are now colluding, with him for the purpose of enabling him to obtain an unlawful preference over the interveners and other creditors. (5) They pray to be allowed to contest the sufficiency of the affidavits of the plaintiff; to traverse the grounds of attachment stated in said affidavits, and to have an issue as to the existence of said grounds of attachment and the validity thereof.

The petition was sworn to and accompanied by a separate affidavit specifically denying that, at the time of suing out plaintiff's attachment the defendants had transferred and secreted, or were about to transfer and secrete, their goods for the purpose of hindering, delaying or defrauding the plaintiffs; and reiterating the charge of collusion between plaintiff and defendants. No objection was taken to the petition on any ground, and upon the motion of interveners an issue was framed: "Whether the ground of attachment set forth in the plaintiff's affidavit existed at the time of the issuance of the attachment?"

This was set down for trial by jury, and the court ruled that the interveners had the affirmative of the issue and that the burden of proof was upon them. To this ruling the interveners objected and reserved an exception. After the evidence was in, the court instructed the jury to find a verdict for the plaintiff, and thereupon entered a judgment dismissing the petition.

1. Before considering the case on the errors assigned, certain preliminary questions raised by the appellee in support of the judgment must be disposed of. As we have seen, there was no objection taken to the leave to file the petition of intervention, and no demurrer thereto when filed. Now, for the first time, it is urged that the court had no power to permit or to entertain it.

Since a very early day, the right of one claiming title to, or an interest in, property that has been attached, to intervene in the cause and controvert the truth of the grounds of the attachment stated in the plaintiff's affidavit has been firmly established. Campbell v. Morris, 3 H. & McH. 552; Ranahan v. O'Neale, 3 G. & J. 298, 301; Stone v. Magruder, 10 G. & J. 383, 386; Carson v. White, 6 Gill, 17, 26; Clark v. Meixsell, 29 Md. 221, 227. The same practice has obtained in the Supreme Court of the District of Columbia, and has been repeatedly sanctioned by that court in General Term. United States v. Howgate, 2 Mackey, 408; Wallace v. Maroney, 6 *Id.* 221, 223; Reynolds v. Smith, 18 D. C. 27. Twice since the organization of this court the right of intervention has passed unquestioned. Robinson v. Morrison, 2 App. D. C. 105, 120, 21 Wash. Law Rep. 579. Matthai v. Conway, 2 App. D. C. 45, 50, 21 Wash. Law Rep. 39. The point must now be regarded as settled.

It is true the interveners in this case do not claim ownership of the property, but a lien thereon and superior right to subject it to the satisfaction of their judgment. We see no difference in principle, however, between the right of intervention of one who claims title to the property and of one who asserts an interest through a lien by contract, or by operation of law under an execution or attachment. Clark v. Meixsell, 29 Md. 221; Buckman v. Buckman, 4 N. H. 319; Clough v. Curtis, 62 N. H. 409; Jacobs v. Hogan, 85 N. Y. 243; Drake on Attachments, Secs. 273, 275.

2. It is further urged that the petition of intervention is fatally defective in that it does not sufficiently appear from its allegations that the defendants in attachment had no other property upon which interveners might have levied their execution and obtained complete satisfaction. Had this objection been taken by demurrer and sustained, there would be no error in the dismissal of the petition. But however important the fact, it was not jurisdictional; and whilst its omission was a grave defect in the petition, it was one that could, and doubtless would, have been supplied by immediate amendment had attention been directed to it at the proper time. It would be unjust now to hold, regardless of any error that may have been committed on the trial, that the judgment must nevertheless stand because of that defect in the petition.

3. The next and last point offered in support of the judgment would be decisive if well taken. The right to intervene is founded on an interest in the attached property acquired by the issue, and delivery to an officer, of the execution. If there be no such interest the defect is incurable. The necessity of some interest in the property, by way of claim of title or lien, or superior right to satisfaction, is essential to the right of intervention. Phillips v. Both, 58 Iowa, 499, 502; Scharff v. Chaffee, 68 Miss. 641; Tira v. Smith, 93 N. Y. 87.

At common law, the lien of a *fi. fa.* dated from its *teste*. Freeman, Executions, Sec. 135. This was modified by the Act of Charles II., Sec. 16, so as to make the lien (as against all but innocent purchasers for value, perhaps), date from the delivery of the writ to the proper officer for execution. That statute was in force in Maryland at the time of the cession of the territory of the district, and has not since been repeated. Comp. Stat. D. C. p. 222, Sec. 1; Arnott v. Cooper, 1 H. & J. 471; Selby v. Magruder, 6 H. & J. 454; Furlong v. Edwards, 3 Md. 99, 113.

Founded in the fact that courts of justices of the peace are not considered courts of record, there is some question whether executions therefrom bind the property under the act aforesaid from the time of delivery to the officer, or from

the time of actual levy only. 12 Am. & Eng. Ency. Law, 478; Freeman, Executions, Sec. 199.

In the view that we have taken of the case, that question is of no practical importance and need not be decided. There was no way in which the constable could have made an actual levy of intervener's writ upon the property. It had been seized by the marshal under the attachment and was thereby put beyond the interference of any other court or officer. Hagan v. Lucas, 10 Pet. 400; Covell v. Hyman, 111 U. S. 176. Whilst the writ might have been delivered to the marshal for execution (R. S. D. C. Sec. 912), the constable was the regular executive officer of the justice's court, charged by law with the execution of its process. R. S. D. C. Sec. 1038. Had the writ been delivered to the marshal himself, he could not have reseized the property and held it thereunder. There is no express provision of law requiring or authorizing him to indorse a subsequent execution as levied upon the property subject to the attachment, though he might probably be permitted to do so, in order to fix a right thereunder to claim the surplus after the discharge of the prior writ, or to contest its priority or validity.

The statute of Charles aforesaid requires the officer to indorse upon each *fi. fa.* the date of its receipt for the apparent purpose of determining its priority, but provides nothing further to be done in order to fix and retain its lien upon property that may have been seized under a prior writ.

For the purposes of this case, at least, the action taken by the interveners should be regarded as the equivalent of an actual levy. Everything was done that could be lawfully done. The judgment was obtained and the writ issued and delivered to the regular officer of the court for execution. That officer could not take the property into his possession. All that he could do was to hold the writ, notify the marshal, perhaps, and remain in position to seize the property should the attachment be quashed, or its remainder, should a part only be required to discharge the prior writ. This we think was sufficient to authorize the judgment creditors to intervene and controvert the grounds of the attachment that bars the way to the enforcement of their execution.

4. This brings us to the consideration of the error assigned by the appellant. Did the court err in requiring the interveners to assume the burden of proving that the grounds of the attachment were not true? The statute authorizes the issuance of an attachment at the commencement, or during the pendency, of a suit upon an affidavit of the plaintiff alleging the existence of certain grounds, and "supported by the testimony of one or more witnesses." R. S. D. C. Sec. 782.

Upon compliance with this section the attachment is issued by the clerk as a matter of course. As has been said by this court: "The duty of the clerk is ministerial. He makes no inquiry into the truth or falsity of any facts stated in the affidavits. If they conform generally to the statute, and the undertaking is offered with satisfactory surety, he issues the writ at once." Weiler v. Chock, 4 App. D. C. 330, 22 Wash. Law Rep. 729.

The next section provides: "If the defendant, his agent or attorney, shall file an affidavit traversing the plaintiff's affidavit, the court shall determine whether the facts set forth in the plaintiff's affidavit are true, and whether there was just ground for issuing the writ of attachment; and if the facts do not sustain the affidavit, the court shall quash the writ of attachment or garnishment; and this issue may be tried by a judge at chambers on three days' notice." R. S. D. C., Sec. 783.

When the affidavit is traversed, the issue is to be tried, at the demand of either party, upon oral evidence. Robinson v. Morrison, 2 App. D. C. 105, 116, 22 Wash. Law Rep. 35. We think that by the natural and proper construction of the statute the burden, on that trial, is cast upon the plaintiff to prove the existence of facts which justify the attachment. It does not say that the defendant shall disprove the facts alleged by the plaintiff, but that the court shall determine whether the facts alleged by the plaintiff are true, and shall quash his writ "if the facts do not sustain the affidavit."

The writ of attachment is a harsh and severe process, though necessary in many cases for the proper protection of creditors. The right to have it is a privilege granted upon the alleged existence of certain facts. The affidavits required are *prima facie* sufficient to authorize the clerk to perform the ministerial act of its issuance; but this *prima facie* case is overthrown by the traverse under oath, and if the plaintiff offers no evidence to support the truth of his averments his attachment will and ought to fail. The affirmative is upon the plaintiff, and to require the defendant to take the burden of establishing a negative is to reverse the natural order of pleading and proof. There is certainly no hardship in imposing upon the former the burden of maintaining the advantage obtained by his writ. Having knowledge of the facts sufficient to justify him in making affidavit of their existence, he ought to be prepared with some evidence to prove his charges. Where the intent to defraud is charged in general terms, the defendant often might not know how and with what evidence to prepare to disprove the charge until informed by plaintiff's evidence of the specific acts from which the inference had been drawn.

The conclusion that we have reached after much consideration is, in our opinion, not only sound in principle, but supported by many well considered decision, which, when examined, will be seen, in so far as they may be influenced by statute at all, to be founded on provisions substantially like our own. Wright v. Rambo, 21 Gratt. 158, 162; Oliver v. Wilson, 29 Ga. 642, 645;

Coston v. Page, 9 Ohio St. 397; Talbot v. Pierce, 14 B. Mon. 158, 164; Hawkins v. Albright, 70 Ill. 87; Jones v. Swank, 51 Minn. 285; Ellison v. Tallon, 2 Neb. 14; Citizens State Bank v. Baird, 42 Neb. 219; Wynn v. Wilmarth, 1 S. Dak. 172; Bamberger v. Halberg, 78 Ky. 376.

The effect of the intervention was to make the interveners virtually defendants to the writ of attachment. By virtue of their acquired interest in the property, they had acquired the same right that defendants had to traverse the affidavit for attachment. If that attachment was falsely and wrongfully sued out and defendants failed or refused to make defense to it, the interveners had the right to do so in order to remove it as an impediment to their better right of seizure and sale in satisfaction of their execution. To this extent they were entitled to stand in the shoes of the defendants. Campbell v. Morris, 3 H. & McH. 553; Clark v. Meixsell, 29 Md. 221. This situation illustrates, also, the reasonableness of the rule that imposes the burden of proof upon the plaintiffs, to sustain the attachment. If it were upon the interveners and especially in a case where there might be collusion between the plaintiff and defendant, their proceeding would rarely be productive of results. It follows that the court erred in imposing the burden of proof upon the interveners, and that the judgment must be reversed.

5. In respect of the charge of collusion, however, between the parties, the rule is different. That issue is separable from the other, and upon it the interveners have the affirmative and must assume the burden of proof. If the facts warranting the attachment should not be proved, it would be quashed without regard to the question of collusion; for no plaintiff should have the benefit of an advantage obtained by false or reckless swearing, even if there has been no collusion and the defendant simply remains indifferent to the charges against him. Even if proof should be made of conduct on the part of the defendants which, under ordinary circumstances, would justify attachment, the writ ought nevertheless to be quashed upon proof of fraudulent collusion between the plaintiff and defendant. If the facts were such as to bring the case within the provisions of the General Assignment Act (27 Stat. 474), such an attempt to give a preference would be as much within the prohibition of the statute as an attempt to accomplish the same end by private contract. Indeed, an attempt to use the process of the court for an unlawful purpose would be far more reprehensible.

For the error pointed out above, the judgment will be reversed, with costs to the appellants, and the cause remanded with direction to set aside the verdict and grant a new trial. It is so ordered. Reversed and remanded.

NOTE.—It will be observed in the foregoing case, that the grounds of attachment stated by the plaintiff in his affidavit, were that the defendants were disposing of their goods with intent to hinder, delay and defraud their creditors in the collection of their debts. The issue framed, upon an intervention by junior execution creditors, was, "whether the ground of attachment set forth in the plaintiff's affidavit, existed at the time of the issuance of the attachment." Upon this issue the court of appeals held, reversing the court below, that the burden of proof devolved upon the plaintiff to prove the ground of attachment stated. Now the question arises, when will the plaintiff be deemed to have established the ground of attachment in such a case? Will it be sufficient for him to show a fraudulent disposition of goods by the debtor, without reference to his intent toward any particular creditor, or must he go further and show an intent on the part of the debtor to defraud him, the plaintiff, in the collection of his debt? We cannot but conclude that this requirement is satisfied, for the time being at least, by satisfactory proof that the debtor was disposing of his property with intent to defraud creditors, without reference to his intentions toward the plaintiff. The presumption in such a case should be that the debtor intends to defraud all of his creditors. If this were not true, a plaintiff against whom no suspicion of collusion with the defendant could be directed, might be deprived of the benefit of his attachment by his failure to produce evidence of a kind which he could not be expected to command. The state of the debtor's mind, or the nature of his intentions, could only be proved by outward manifestations, and these would apply as well to one creditor as another. But it is to be remembered that a fraudulent and collusive attachment is greatly assisted by the fact that the debtor is, in truth, disposing of his goods with intent to defraud real creditors. Examination of the reports will show that in nearly every collusive attachment that has been attacked in the courts, the grounds of attachment stated were that the defendant was fraudulently disposing of his property. No other kind of attachment lends its aid so effectively to the collusive parties. It is an easy matter for the defendant to give color to the claims of the plaintiff, either by inculpatory statements, or by overt acts, such as secreting his goods, or shipping them out of the jurisdiction. In nine cases out of ten the defendant is, as a matter of fact, disposing of his goods with intent to defraud real creditors, and the fraudulent parties rely upon that fact to help them confuse the jury, who might not, in every case, discriminate between genuine creditors and impostors. The defendant is really insolvent, and seeking to put his property beyond the reach of creditors as fast as he can, and he, with the collusive plaintiff, artfully avails himself of that fact to give the attachment the appearance of good faith. We are, therefore, led to conclude that suspicious circumstances appearing in the case, such as inculpatory statements and declarations made by the defendant to the plaintiff and embraced in the plaintiff's affidavit, the failure of the defendant to take advantage of glaring defects in the attachment and obvious grounds of defense, the failure of the plaintiff to protect his interest at a sale under the attachment, friendly communication and business intercourse between the parties after the attachment, and the like, should be clearly and satisfactorily explained by the plaintiff to the court, under penalty of a dissolution of the attachment. In this connection we may here advert to the language of the court in Lowenstein v. Aaron, 12 South. Rep. 269 (69 Miss.): "While the issue which the plea in abatement tenders is, in its general aspect, the existence or non-existence of the grounds of attaching contained in the affidavit of the original attaching creditor, yet to confine the investigation with rigid inflexibility to the

very letter of the inquiry, would, we think, defeat in a large measure the beneficent purpose of the statute. The alleged grounds of attachment may be true as to the subsequently attaching creditors—true generally, but not true in any proper sense as to the original attacher, who bases his right to an attachment upon such alleged ground. · · · The original attacher cannot, by fraudulent collusion with the debtor, manufacture grounds for attachment, and then avail himself of them to defeat junior attachers, who take out writs in good faith predicated upon the very grounds alleged in the senior attachment." In addition to the authorities cited by Mr. Justice Shepard in the principal case, to the proposition that the burden devolves on the plaintiff to prove the grounds of attachment stated by him, when denied by interveners, see 1 Shinn on Attachment, § 437 (1896); Speyer v. Ihmels, 21 Cal. 280, and Posey v. Underwood, 1 Hill (S. C.), 262. If the plaintiff colludes with the defendant, the attachment will be vacated whether the plaintiff's claim is fictitious or not. Comer v. Heidlebach (Ala.), 19 South. Rep. 719. See, generally, upon the right of junior attachment or execution creditors to intervene and contest the plaintiff's right to an attachment and the practice upon such intervention, the following cases: Briggs v. French, 2 Sumner, C. C. 251; Lodge v. Lodge, 5 Mason, C. C. 407; Sannoner v. Jacobson, 47 Ark. 31, 14 S. W. Rep. 458; Hardware Co. v. Deere, 53 Ark. 140; Rice v. Dorrian, 57 Ark. 541; McKinty v. Gladwin, 10 Cal. 227; Patrick v. Montader, 13 Cal. 434; Davis v. Eppinger, 18 Cal. 378; Speyer v. Ihmels, 21 Cal. 280; Thompson v. Rose, 16 Conn. 71; Smith v. Gettinger, 3 Ga. 140; Harvey v. Jewell, 84 Ga. 234; Yates v. Dodge, 123 Ill. 50; Tool v. Lamphere, 8 Ill. App. 399; Lytle v. Lytle, 37 Ind. 281; U. S. Express Co. v. Lucas, 36 Ind. 361; Selz v. Beldin, 48 Iowa, 451; Peters v. Conway, 4 Bush (Ky.), 265; Bamberger v. Halberg, 78 Ky. 376; Moore v. Stege, 98 Ky. 27; Gilkison v. Bond, 44 La. Ann. 841; Gover v. Barnes, 15 Md. 576; Howard v. Oppenheimer, 25 Md. 350; Hardesty v. Campbell, 29 Md. 533; Clark v. Meixsell, 29 Md. 228; Pierce v. Jackson, 6 Mass. 242; Whitten v. Smith, 11 Mass. 211; Strong v. Wheeler, 5 Pick. 410; Adams v. Paige, 7 Pick. 542; Carter v. Gregory, 8 Pick. 165; Lambert v. Craig, 12 Pick. 199; Fairfield v. Baldwin, 12 Pick. 388; Hale v. Chandler, 3 Mich. 531. *Contra:* Henderson v. Thornton, 37 Miss. 448; Paine v. Holliday, 68 Miss. 298, 8 South. Rep. 676; Lowenstein v. Aaron, 69 Miss. 341; First Nat. Bank v. Cochran, 14 South. Rep. 439; Jump v. Batten, 35 Mo. 193; Henson v. Tootle, 72 Mo. 632; Claflin v. Sylvester, 99 Mo. 276; Buckman v. Buckman, 4 N. H. 319; Webster v. Harper, 7 N. H. 594; Blaisdell v. Ladd, 14 N. H. 129; Kimball v. Wellington, 20 N. H. 439; Pike v. Pike, 24 N. H. 384; Page v. Jewett, 46 N. H. 441; Clough v. Curtis, 62 N. H. 409; Reed v. Ennis, 4 Abb. Pr. (N. Y.) 393; Walker v. Roberts, 4 Rich. (S. C.) 561; Myers v. Whitehart, 24 S. C. 196; Orr v. Harris, 82 Tex. 293; Kollette v. Seibel, 7 Tex. Civ. App. 260; Goodbar v. Nat. Bank, 78 Tex. 461; Zadick v. Shafer, 77 Tex. 501; Heidenheimer v. Johnson, 76 Tex. 200; Bateman v. Ramsey, 74 Tex. 589; Pitkins v. Johnson, 2 S. W. Rep. 459; Freiburg v. Freiburg, 74 Tex. 122; Sanger v. Trammell, 66 Tex. 361; Johnson v. Heidenheimer, 65 Tex. 263; Grabenheimer v. Rindskopf, 64 Tex. 49; Nenny v. Schleuter, 62 Tex. 327; Peticolas v. Carpenter, 53 Tex. 23; Murray v. Eldridge, 2 Vt. 308; Harding v. Harding, 25 Vt. 487; Ludington v. Hull, 4 W. Va. 130, and the following text writers: Drake on Att. (7th Ed.) §§ 273, 276, 278; 1 Wade on Att. § 54, 286; Waples on Att. (2d Ed.) §§ 796, 798, 792; Shinn on Att. ch. "Intervention."

CHAPMAN W. MAUPIN.

Washington, D. C.

## CORRESPONDENCE.

### VIEW BY JURY.

*To the Editor of the Central Law Journal:*

In your issue of Sept. 3d, 1897, you have an article on p. 196, on "Views" and "Evidence." The subject there discussed was passed upon by the Circuit Court of Ohio in the case of Columbus v. Bidlingmeier, 7 O. C. C. R. 136, and by the Supreme Court of Ohio in Machrader v. Williams, 54 O. S. R. 344, the holding in both cases being that the view by the jury is solely to enable them to apply the testimony adduced.

GILBERT H. STEWART.

## BOOK REVIEWS.

AMERICAN STATE REPORTS, Vol. 54.

This volume contains many cases of special interest and value. We note particularly Goodloe v. Memphis & Charleston R. R. Co. (Ala.), wherein it is held that the doctrine of *respondeat superior*, in the law of master and servant, has no application when the servant actually wills and intends an injury or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. Appended to this case is an exhaustive note on the subject of acts of servant for which the master is not answerable. Little Rock & Ft. Smith Ry. Co. v. Wells (Ark.), is another good case. Therein is considered the question as to relief in equity, other than by appellate proceedings against judgments, decrees, and other judicial determinations. An able note also accompanies this case. Green v. Coast Line R. R. Co. (Ga.), treats of claims which take precedence over mortgages of railway and like property. Many other valuable cases with annotations are to be found in the volume Published by Bancroft-Whitney Co. San Francisco.

## BOOKS RECEIVED.

Law-Latin, a Treatise in Latin, with Legal Maxims and Phrases, as a Basis of Instruction. By E. Hilton Jackson, A. M. LL. M., Instructor in Law and Law-Latin in the Summer School of the Columbian University. Washington, D. C. John Byrne & Company, 1897.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. LV. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1897.

## HUMORS OF THE LAW.

Judge: "Don't you think that this is a matter which could be settled out of court?"

Plaintiff: "Can't be done, your honor, I thought of that, but the cowardly defendant will not fight."

"Oh," said the lady lecturer, "I have had such a delightful conversation with the gentleman you saw bow to me as we left the train. He told me the emancipation of woman had been his life work for ever so many years." "Yes," said the woman who had come to meet her, "that is so. He has been a divorce lawyer ever since I could remember."

A good story is told of a Glasgow baillie on the occasion of a witness being sworn before him. "Hold up your right arm," commanded the lineal descendant of Baillie Nicol Jarvie. "I canna dae't," said the witness. "Why not?" "Got shot in that airm." "Then hold up your left." "Canna dae that either—got shot in the ither airm, too." "Then hold up your leg," responded the irate magistrate; "no man can be sworn in this court without holding up something."

A Georgia lawyer, who had a case in which conviction for his client seemed certain, closed his argument with a scriptural quotation. To the amazement of all, the jury returned a verdict of "Not guilty," without leaving their seats. After court had adjourned, the lawyer adproached the foreman.

"I am curious to know," he said, "just on what point of law you based your verdict?"

"It warn't no law point, Colonel," replied the foreman, "but we couldn't jest git over the Scripture."

Timid Traveler—"Is this a law-abiding community, my friend?"

Reckless Resident—"Why say, podner, there's more law abidin' in this community than you've any idee of. There's fourteen lawyers, five judges an' six prosecutin' attorneys, ter say nuthin' uv deputy sheriffs and bill collectors, all planted over in that cemetery."

An old lawyer in Paris had instructed his client to weep every time he struck the desk with his hand, but forgot and struck the desk at a wrong moment. She promptly fell to sobbing and crying. 'What is the matter with you?" asked the judge. "Well, he told me to cry as often as he struck the table." "Gentlemen of the jury," cried the unabashed lawyer, "let me ask you how you can reconcile the idea of crime in conjunction with such candor and simplicity?"

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**


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1. ADMINISTRATION—Executors—Sale of Land in Foreign State.—An executor and his sureties are not liable on his bond for the proceeds of lands in a foreign State, sold by him under power conferred by the will, said will never having been probated in the State where the lands lie, so as to authorize such sale.—EMMONS v. GORDON, Mo., 41 S. W. Rep. 998.

2. ATTACHMENT — Levy — Appraisement.—Under section 197 of the Code of Civil Procedure an attachment levy on personal property is sufficient and valid if the officer, with the order of attachment in hand, goes to the place where the goods and chattels of the defendant are found, and there declares, by virtue of said order, that he attaches such property at the suit of the plaintiff, and thereupon takes such possession as devests the defendant's possession and gives to the officer a claim of dominion, coupled with the power to exercise it, over the attached property.—DODSON v. WIGHTMAN, Kan., 49 Pac. Rep. 790.

3. BILLS AND NOTES—Mortgages—Non-negotiability.—The stipulation in a note which includes the covenants of a mortgage by which the maker agrees to pay the taxes on the property, assessments, insurance, and waste, renders the note non-negotiable.—DONALDSON v. GRANT, Utah, 49 Pac. Rep. 779.

4. BILLS AND NOTES—Promissory Note — Negotiability.—A note falling due in the hands of the payee ceases to be negotiable. Afterwards indorsers take it subject to the same defenses that could have been made to it in the hands of the payee. The stipulation to pay attorney's fees in case of suit binds the maker to pay them as a part of the costs of the remedy, but he cannot be required to pay more than the fees actually charged. They are for the attorney, not for the plaintiff.—SALISBURY v. STEWART, Utah, 49 Pac. Rep. 777.

5. CONSTITUTIONAL LAW—Polygamous Children — Inheritance.—Where the legislature of the State by statute declares that in all cases involving the right of polygamous children to inherit, determined against them before the act in any of the courts of the territory, a motion for a rehearing or new trial shall be entertained on their application who were parties at any time within one year after the act took effect, and the court is required to entertain the motion for a new trial or rehearing regardless of when the judgment or decree became final, the legislature assumed a control over the judiciary not warranted by the constitution, and such a statute, destroying vested rights, and the finality of judicial determinations, is unconstitutional and void.—IN RE HANDLEY'S ESTATE, Utah, 49 Pac. Rep. 829.

6. CORPORATIONS—Apportionment of Stock—Increase of Capital.—Where a corporation increases its capital stock, each holder of original stock is entitled to a portion of the new stock, because it includes an undivided part of the common property, of every part of which he is an owner, and of which a conveyance can be made only with his consent, or by legal process.—JONES v. CONCORD & M. R. R., N. H., 38 Atl. Rep. 128.

7. CORPORATIONS—Liability of Stockholders.—No liability for the debts of a corporation can be enforced against a stockholder until a judgment upon the debts has been rendered against the corporation, and an execution issued thereon, and returned *nulla bona*, or until the corporation has been dissolved, or has suspended business for more than one year.—MERRILL V. MEADE, Kan., 49 Pac. Rep. 787.

8. CORPORATIONS—Transfer of Stock.—Under the laws of the State of Maine (Rev. St. 1883, tit. 4, ch. 48, § 19), providing that the signers of articles of incorporation, and their successors and assigns, shall be a corporation from the time of filing the required certificate in the office of the secretary of state, an agreement between such subscribers prior to organization, or between them and such organized body prior to such filing of such certificate, is invalid to prevent the transfer of stock without first giving the corporation the option of purchase.—IRELAND V. GLOBE MILLING & REDUCTION CO., R. I., 38 Atl. Rep. 116.

9. CRIMINAL LAW.—Where defendant in a criminal prosecution did not offer himself as a witness, and his testimony as taken on a former trial on the same indictment was read to the jury on behalf of the State, as declarations tending to prove guilt, it must be presumed, in the absence of a certificate showing that the bill of exceptions contains all the evidence, that whatever foundation was necessary for the admission of such testimony was laid.—STATE V. CHILDERS, Oreg., 49 Pac. Rep. 801.

10. CRIMINAL LAW — Instructions.—A charge in the form, "does such a witness (naming him) say" thus and so? (repeating the testimony), violates Const. 1895, art. 5, § 26, providing that "judges shall not charge jurors in respect to matters of fact, but shall declare the law," since the charge states the testimony, though it be in interrogative form.—STATE V. STELLO, S. Car., 27 S. E. Rep. 659.

11. DEED OR MORTGAGE — Assignment for Benefit of Creditors.—A declaration of trust executed by a solvent person contemporaneously with an absolute deed recited that whereas the maker was in a state of mortal illness, and desired to provide for the payment of his debts, he had conveyed his real estate to plaintiff, in trust to pay his debts, with the desire to avoid proceedings in the courts; it being declared that the deed was a conveyance in trust, with full power to sell, the balance, after payment of debts, to be returned to the maker, his heirs, executors, or assigns: Held, that the deed and agreement did not constitute a mortgage, but passed the absolute legal title to the land.—LADD V. JOHNSON, Oreg., 49 Pac. Rep. 756.

12. ELECTIONS — Preparing and Marking Ballots.—Rev. St. 1889, § 4781, as amended by Act April 4, 1891, and Act April 18, 1893, provides that on receipt of his ballot the elector shall prepare his ballot "by crossing out the groups" he does not wish to vote by drawing a line or lines lengthwise through a part or all of the column of names in the rejected groups; a partial erasure of a group by lines lengthwise of the column or in any other manner than by the erasure of a name to substitute another to be taken as a rejection of the whole group; and "then make all changes on one group" by striking out the name or names of candidates he does not wish to vote for, and writing the name or names of his choice below, so that the remaining part shall express his vote on the question submitted, etc.: Held, that such statute is mandatory, and a failure to thus prepare a b llot vitiates it.—HOPE V. FLENTGE, Mo., 41 S. W. Rep. 1002.

13. EXECUTION — Lien—Priorities. — Existence of a mortgage whereby legal title to the mortgaged property is in the mortgagee, with only an equity of redemption in a judgment debtor, does not defeat the lien of execution, though the aid of equity is necessary for its enforcement.—GREEN V. WESTERN NAT. BANK OF BALTIMORE, Md., 38 Atl. Rep. 131.

14. FEDERAL COURTS—Copyright Cases.—A bill filed in the State court alleged that complainant was the author of a certain song; that the song and accompanying music were his property; and that defendants, without his knowledge, procured a copyright thereon. The bill prayed that defendants be ordered to assign the copyright to complainant, "by instrument of assignment such as is provided for by the statute of the United States," and also prayed an injunction to restrain defendants from interfering with his right to the use of the song: Held, that this was not a suit arising under the copyright laws of the United States, so as to be within the jurisdiction of the federal courts, but was one merely involving the title to the copyright, which depended on the rules of the common law, and hence that the suit was not removable from a State to a federal court.—HOYT V. BATES, U. S. C. C., D. (Mass.), 81 Fed. Rep. 641.

15. INJUNCTION—Jurisdiction.—A trustee in possession of goods conveyed to him by a firm to be sold to pay debts can by injunction compel the restoration of certain goods seized and taken from his possession under execution against one of the partners, on showing that by reason of the taking of such goods the remainder of the stock would be greatly depreciated in value, as such stock could, under Rev. St. arts. 2349, 2352, be levied on only by notice.—SUMNER V. CRAWFORD, Tex., 41 S. W. Rep. 994.

16. INSOLVENCY—Trial by Jury.—Gen. Laws, ch. 274, providing for the distribution of an assigned insolvent estate without providing for a jury trial of the validity of claims presented against the estate, is not contrary to Const. art. 1, § 15, which provides that "the right of trial by jury shall remain inviolate," since at the time of the adoption of the constitution there was no provision for a jury trial of such claims, and this especially in view of section 18 of said chapter, providing that a debtor may prevent insolvency proceedings until declared insolvent by a jury.—MERRILL V. BOWLER, R. I., 38 Atl. Rep. 114.

17. INTOXICATING LIQUORS—Indictment—Duplicity.—An indictment should not be quashed because it contains three counts, each of which sets out a distinct misdemeanor.—STATE V. BECKROGE, S. Car., 27 S. E. Rep. 658.

18. MALICIOUS PROSECUTION—Probable Cause.—On a preliminary examination, a finding that there is sufficient cause for holding the accused to answer is only *prima facie* evidence of probable cause, and may be overcome by competent evidence on a trial for malicious prosecution.—HESS V. OREGON GERMAN BAKING CO., Oreg., 49 Pac. Rep. 803.

19. MANDAMUS—Secretary of State.—Under Hill's Ann. Laws, § 2848, providing that the secretary of state shall cause to be printed blank assessment rolls and other forms, and section 2208, subd. 7, requiring him to examine the claim therefor, and to draw his warrant for it, *mandamus* will issue to compel him to act, but not to direct how or to what effect he shall act; since, in passing on the quality of the work and materials, reasonableness of the charge, etc., he must exercise his discretion and judgment.—IRWIN-HODSON CO. V. KINCAID, Oreg., 49 Pac. Rep. 765.

20. MASTER AND SERVANT—Dangerous Premises—Assumption of Risk.—A coal mining company was accustomed to place a danger signal on rooms on which standing gas had been detected, and such signal was well understood by all employees to be an imperative command prohibiting entrance with a naked light into any room or place where danger was thus indicated. There was no danger from the standing gas if it were not ignited. An employee went to work in the mine with knowledge of the rule, and that an explosion in another room would endanger life in his own room, and relying on his fellow-servants' observance of the danger signal: Held, that he assumed the risk, and the company was not chargeable with negligence in not providing a safer place in which to work.—CERRILLOS COAL R. CO. V. DESERANT, N. Mex., 49 Pac. Rep. 807.

21. MASTER AND SERVANT—Unsafe Premises.—In an action by a railway brakeman for injuries suffered in uncoupling cars through an alleged defect in the track, an instruction that defendant "undertook to furnish plaintiff a reasonably safe place to work" is erroneous, defendant's true obligation being to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish a reasonably safe place to work and to keep it in reasonably safe repair.—LOUISVILLE & N. R. CO. v. JOHNSON, U. S. C. C. of App., Seventh Circuit, 81 Fed. Rep. 679.

22. MECHANICS' LIEN—Extent.—A lien for lumber used in several structures on the same tract, under one contract, may exist on the whole, when they constitute one plant.—SALT LAKE LITHOGRAPHING CO. v. IBEX MINE & SMELTING CO., Utah, 49 Pac. Rep. 768.

23. MORTGAGES—Mechanics' Liens—Priority.—Chapter 30, Sess. Laws 1892, declaring that debts of corporations or natural persons due for services performed by laborers within six months before the seizure of the debtor's property on process, or the suspension of his business by the action of creditors, or before his property shall be put into the hands of a receiver or trustee shall be treated as preferred, does not affect the rights of existing grantees, mortgagees, or lienholders.—SALT LAKE LITHOGRAPHING CO. v. IBEX MINING & SMELTING CO., Utah, 49 Pac. Rep. 832.

24. MUNICIPAL CORPORATIONS—Acts of De Facto Officers.—A city ordinance is not void, though voted for by those who were merely *de facto* councilmen, and passed at a meeting at which there was not a quorum of *de jure* councilmen present, the acts of the *de facto* councilmen, who were holding over after the expiration of the time for which they were appointed to fill vacancies, having been performed with the full knowledge of the other members of the council, who had the right to reappoint them upon the failure to have an election at the proper time.—PENCE v. CITY OF FRANKFORT, Ky., 41 S. W. Rep. 1011.

25. MUNICIPAL CORPORATIONS — Control of Streets — Street Railroads.—The powers of a municipal corporation over its public streets are held in trust for the public benefit, and cannot, in the absence of clearly delegated authority, be surrendered or delegated by contract to private parties, either corporate or natural.—FLORIDA CENT. & P. R. CO. v. OCALA St. & S. R. Co., Fla., 22 South. Rep. 693.

26. MUNICIPAL CORPORATIONS—Estoppel—Violation of Contract.—A city which voluntarily made a purchase of property with which to complete drainage improvements under authority conferred by an act of the legislature, and issued in payment therefor warrants on the drainage fund, a part of which it had collected, and the remainder of which it contracted to collect, but afterwards abandoned the work, and thus rendered the drainage assessments invalid and uncollectible, and otherwise obstructed their collection, is estopped to set up, in defense to an action against it on the warrants, that it had, previous to their issuance, discharged claims against the drainage fund in excess of the amount collected. — WARNER v. CITY OF NEW ORLEANS, U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 646.

27. PARTNERSHIP — Participation in Profits. — An agreement by a party who loans money to, and becomes surety for, a lessee, stipulating for a share of the profits of the leased property, does not make him liable for unpaid rent, as a partner, though the contract provides that no subletting or assignment shall be made without his consent. — RANDLE v. BARNARD, U. S. C. C. of App., Seventh Circuit, 81 Fed. Rep. 682.

28. PARTNERSHIP — Sharing in Profits. — A merchant conducting a business in his own name entered into an agreement with his sons in 1879 whereby they took the business, conducting it in their names, while the father left his capital in the business and acted as buyer for the firm, receiving a portion of the profits. In 1888, the father's health having failed, he ceased to purchase for the firm, but the other terms of the agreement remained unchanged. In September, 1892, the firm, then in a precarious financial condition, gave the father a note for $5,181, representing his original capital and some accrued profits due under the agreement. In January, 1893, the firm assigned for the benefit of its creditors, naming the father as preferred creditor: Held, that the father was a partner of the firm, and the assignment was hence fraudulent as to its creditors.—JOHNSON v. ROTHSCHILDS, Ark., 41 S. W. Rep. 996.

29. RAILROAD COMPANY — Assignment of Lease.—The assignee of a railroad lease for a term of 30 years, having operated the leased road for a long time, and elected to recover the sums due to the lessee from the lessor under the lease, cannot escape the obligations resting on the lessee, on the ground that the lessor has never consented to the assignment, as stipulated in the lease.—SCHMIDT v. LOUISVILLE & N. R. Co., Ky., 41 S. W. Rep. 1015.

30. SALE—Breach of Contract — Damages. — Where a seller of personal property prior to the time of delivery notifies the buyer that he will not deliver the property purchased, and the buyer upon the receipt of such notice purchases the same kind of property from another at its then market value, which is in advance upon the contract price, and where at the time delivery was to have been made the market value of such property is at or below the contract price, the buyer cannot recover from the seller such advance price paid.—YORK-DRAPER MERCANTILE CO. v. LUSK, Kan., 49 Pac. Rep. 788.

31. SPECIFIC PERFORMANCE — False Representations. —Specific performance will not be decreed against a purchaser at auction of a ground rent, the statement in the advertisement and by the auctioneer that it was a well-secured rent being false.—CRANE v. JUDIK, Md., 38 Atl. Rep. 129.

32. TELEGRAPHS—Delay — Proximate Cause.—The delay of a telegraph company in delivering a message warning the person to whom it is addressed that armed men are pursuing him is not the proximate cause of his death at the hands of his pursuers.—ROSS v. WESTERN UNION TEL. CO., U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 676.

33. WILLS — Specific Devises — Payment of Debts. — Under a will devising a particular field to an adopted daughter, another field to his nephew, subject to a legacy of $500 to a niece, and devising and bequeathing the balance of the land and estate, subject to a bequest of $150 to his adopted daughter, to his wife, all three devises are specific, and must therefore contribute to payment of the debts, for which no provision was made, and most of which were adjudged against the estate after death of testator, on a claim to which he supposed there was a good defense. — IN RE PITMAN'S ESTATE, Penn., 38 Atl. Rep. 133.

34. WILLS—Testamentary Capacity. — Where there is a want of testamentary capacity at the time a will is executed, such will never takes effect, or is not so made and executed as to take effect, without republication, though a statute giving testamentary capacity be subsequently passed. — MITCHELL v. KIMBROUGH, Tenn., 41 S. W. Rep. 993.

35. WITNESS — Impeachment.—A witness impeached by disproving the facts testified to by him cannot be sustained by proof of general good character. Consequently, where evidence was introduced tending to impeach a witness in this manner, and also other evidence tending to impeach him by proof of contradictory statements previously made, and by showing his general bad character, it was erroneous to charge generally that, "when it is sought to impeach a witness by either of these modes, the credibility of the witness may be restored by proof of general good character." The effect of such a charge would be to allow proof of good character to restore the witness to credibility, even though the truth of his testimony had been actually disproved. — BELL v. STATE, Ga., 21 S. E. Rep. 669.